

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 181
5338331

BETWEEN MICHAEL HOUGHTON
Applicant

A N D STRAY LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Rebecca Murphy, for Applicant
Andrew Schirnack, for Respondent

Investigation Meeting: 27 July 2012 at Christchurch

Submissions Received: 27 July 2012 from applicant and respondent; supplemental
submissions from applicant on 10 August 2012 and 20
August 2012 from the respondent

Date of Determination: 27 August 2012

DETERMINATION OF THE AUTHORITY

- A. The applicant's dismissal was not unjustifiably dismissed.**
- B. The applicant breached the terms of his employment agreement during his employment and a penalty of \$1,000 is imposed against him.**
- C. Costs are reserved.**

Prohibition from publication

[1] During the giving of evidence at the Authority's investigation meeting reference was made to a hotel in the South Island providing a service that was allegedly not up to an acceptable standard. The hotel proprietors were not a party to the proceedings and have had no opportunity to comment, as the allegation formed background information for the Authority only, and nothing material turned it. However, in order to avoid unfair inferences being drawn in respect of the hotel, I

order that all references to the hotel and any information that may identify it not be published. All references to the location of the hotel in this determination are accordingly rendered as X.

Employment relationship problem

[2] Mr Houghton claims that he was unjustifiably dismissed on 26 January 2011. The respondent denies that the dismissal was unjustifiable and counter-claims, seeking penalties against Mr Houghton in respect of alleged breaches of his employment agreement with the respondent company.

Brief account of the events leading to the dismissal

[3] Mr Houghton worked as a bus driver for the respondent company which operates adventure tours around the South and North Islands of New Zealand. Mr Houghton's job at the time of his dismissal was to drive tourists around the South Island, visiting various tourist spots and providing them with information about the sights. He would also attempt to sell adventure activities to them (such as visiting the glacier at Franz Josef). He also liaised with various accommodation providers. Tours lasted from one or two days up to two weeks and it was therefore important for him to maintain a good relationship with his passengers, especially during the longer tours.

[4] On 20 January 2011 Mr Houghton was completing a two week tour and was due to take the group to a hotel in X where they would have a meal and then spend the night. Mr Houghton would also spend the night at that hotel.

[5] Mr Houghton had taken a tour group to this hotel approximately two weeks before and he and his group had had some concerns about the quality of the food. Accordingly, at around 5pm on 20 January 2011 Mr Houghton telephoned his operations manager, Mr Brett Hudson, to talk about his concerns. Mr Houghton's evidence is that Mr Hudson said to Mr Houghton that he would call the accommodation, discuss the food and that Mr Houghton should talk to him the following day once he was back in cell phone coverage if the food had still been below an acceptable standard.

[6] Mr Hudson's evidence is that, during the conversation, Mr Hudson asked Mr Houghton to see what the food was like and report back the following morning when he could. He denies that he had agreed to call the accommodation first. Mr Hudson's

evidence is that, by 5pm, it would have been too late for the chef at the hotel to have changed the plans for the meal given that the group was relatively large (24 passengers). On balance, I prefer the evidence of Mr Hudson on this point as it is unlikely that he, an experienced tour operation professional, would have agreed to call the accommodation so late in the day knowing that it would probably be impossible for the chef to change the meal plans at such a late stage.

[7] Mr Houghton's evidence is that the meal that was provided to his group of 24 passengers on the evening of 20 January 2011 was curried sausage, the same meal that the previous tour group had complained about. His evidence is that the passengers in his group on 20 January were very unhappy about the quality of the meal and, as a group, refused to eat it. The passengers decided to walk out of the meal and go elsewhere for food. The passengers decided to go for a pub meal and, as the only representative of the respondent company, he was the focus of the passengers' complaints and so personally paid for the alternative meals because he was embarrassed by the food and did not want the situation to get worse. He says that he also organised a cake to mark the birthday of one of the passengers because he did not want the last night of the tour to leave a sour memory for her.

[8] Mr Houghton says that he had very little to eat that night and did not sleep well due to hunger and worry about the night's incident. He said that he was aware that the passengers walking out of the meal at the accommodation would cause issues between the accommodation provider, the management of the respondent company and himself.

[9] The following morning, Friday 21 January 2011, Mr Houghton received further complaints from passengers unhappy with the accommodation. He said that they complained about the accommodation being unclean, cold and that rooms were damaged. By this point, Mr Houghton's evidence is that he was tired and very stressed. He decided to write an email to Mr Hudson in the following terms (replicated as written):

From: Mike Houghton
Sent: Friday, 21 January 2011 8.28am
To: Brett Hudson
Subject: re: [X] & 2 years of continuous fucken complaints

Are u actually trying to get me to quit like ONE of your other senior driver are????

2 years of management not sorting out the same old complaints of pax countrywide.

All you do instead of act is to label me as a complaining pain for the office with your collection of numerous printouts of my emails!!!

Taxi [this is the name by which Mr Hudson was known in the office] have you ever run a tour? Or have you ever been a pax on a tour?

Last night i had 24 pax insist that we go elsewhere in [X] to get some alternative dinner cos the food was so bad.

Do you know what that is like to have 24 pax mutiny on their last night? You have yet again destroyed the end of another great tour for those pax. Leaving a sour note.

If the food was acceptable they probably would've accepted the rest of the numerous faults here.

I am never taking a group here again.

*Mike Houghton
Aotearoa,
New Zealand*

[10] Mr Hudson's evidence is that he found this email abusive and completely unacceptable. He showed it to the General Manager of the respondent company, Heather Bailey, who agreed with his assessment of the email. Mr Hudson's evidence is that Ms Bailey suggested he contact Mr Houghton to sort the situation out but to call once Mr Houghton would be away from the passengers.

[11] Before Mr Hudson did this, he received a telephone call from Mr Houghton around 11.30 am. Mr Hudson's evidence is that the call lasted around eighteen minutes and that around the first ten minutes of it consisted of abuse towards him, the respondent company, the head driver of the company and the hotel in X. After about ten minutes Mr Houghton calmed down but did not apologise for the email or the abuse. Mr Hudson's evidence is that he was so shocked by the abuse that he was receiving over the telephone that he put his phone on speaker that the operations assistant, Mr Sullivan, who was in the same room, could hear it.

[12] Mr Hudson's evidence is that Mr Houghton asked him if he had *ever done a fucking tour* and that Mr Hudson wouldn't know what it was like. He says that Mr Houghton said that *no-one ever fucking listens* to him and that they could *all go get fucked*. Mr Hudson says that Mr Houghton said that the food at the hotel in X was *like fucking pig slops* and that he would *never feed it to a fucking pig*. Mr Hudson

says that Mr Houghton said that he was not going back to *the fucking place* as *Glen [the manager] is a fuckwit and the food is shit*. Mr Hudson says that Mr Houghton said that the head driver *doesn't give a fuck* and repeatedly said that the company *didn't give a fuck*. Mr Hudson says that Mr Houghton kept saying in an angry tone *what are you doing, what are you going to fucking do about it Taxi? Probably nothing; you just do nothing Taxi and don't even care*.

[13] Mr Hudson says that after this phone call he again spoke to Ms Bailey and that they decided that it was necessary to invite Mr Houghton to a disciplinary meeting in respect of the email and the swearing and abuse over the telephone. They also discussed whether they should suspend Mr Houghton and Mr Hudson's evidence is that he called up Mr Houghton around 7pm that evening to tell him that he was inviting him to a disciplinary meeting and to discuss whether he should be suspended in the interim. However, Mr Hudson's evidence is that Mr Houghton then abused Mr Hudson again calling him a *fucking arsehole*, saying *you are just a wanker; do you want me to leave this fucking bus in the middle of the petrol station and you can go fuck yourself, you are a fucking joke*.

[14] Mr Hudson states that Mr Houghton then hung up and when Mr Hudson called him straight back the phone went to voicemail. He was not sure where the bus was and was afraid that Mr Houghton would abandon the bus. He finally managed to speak to Mr Houghton and told him that he was not to drive the following day (as Mr Houghton's swearing had convinced him that he should be suspended) and to ensure that the relief driver got the keys.

[15] Mr Houghton's evidence about the two conversations is that he accepts that he did swear at Mr Hudson during the first conversation although cannot remember exactly what he said during either. He said that the second conversation consisted of a heated argument between them in which both he and Mr Hudson swore. In summary, Mr Houghton's evidence about the contents of the two telephone conversations was hazy and imprecise.

[16] During the second telephone conversation Mr Hudson's evidence is that he told Mr Houghton that he was going to send him an email which contained the letter inviting him to a disciplinary meeting. Mr Hudson's evidence is that, once Mr Houghton finally got home and saw the letter, he sent a text to Mr Hudson as follows:

Turned phone off so as not to talk to any other stray staff as u asked. I apologise 4 blowing up at u today. But I had no dinner or sleep in [X]. And due 2 circumstances out of my control 24 angry pax. Very stressfull [sic] being in [sic] the company fall guy caught in the middle. If this is a meeting where my employment with you is at risk I am not prepared to come up at such short notice.

[17] The invitation to the disciplinary meeting, which was signed by Mr Hudson, invited Mr Houghton to attend on Tuesday 25 January at the respondent company's Auckland office, but he was also told to leave on a flight to Auckland on the preceding Sunday, departing at 8.25am. (Mr Houghton did not get this flight as he did not consider it reasonable to have to wait around in Auckland for two days because he had a sick relative in Christchurch).

[18] The letter from Mr Hudson referred to serious concerns he had about Mr Houghton's conduct and listed three issues, as follows:

- 1 In the attached email with the subject line "[X] & 2 years of continuous fucken complaints", you have:*
 - Been very rude and disrespectful to me; and*
 - You have shown an intention to disobey Stray instructions (by making the comment "I am never taking a group here again").*
- 2 When I called you this afternoon at around midday you repeatedly swore at me, using the word 'fuck' repeatedly. Your manner was very rude, aggressive and disrespectful.*
- 3 We have recently received the attached complaints from customers. I have underlined and numbered particular aspects of these complaints that allege rude, unprofessional or unsafe conduct on your part.*

[19] The letter goes on to say that he regarded all the above concerns as serious and that, as a result, if Mr Houghton was unable to provide a satisfactory explanation, he was likely to consider disciplinary action up to and including dismissal. He was also encouraged to bring a support person or representative to the meeting and the letter also stated that he had decided to suspend Mr Houghton from his duties on full pay pending the meeting. The letter also stated the following:

You are instructed not to take any action that would bring the Company into disrepute while you are suspended.

I ask that you not discuss this issue with anyone at Stray other than with me or Heather [Bailey]. This instruction is very important. If you feel that others have information that would assist your explanation, you can let us know at the meeting.

[20] The disciplinary meeting took place on 25 January 2011 and Ms Bailey, Mr Hudson, Mr Houghton and his representative, Mr Law, were present. Helpfully, a transcript of the disciplinary meeting was made available to the Authority, prepared by Mr Houghton from a recording. The transcript appears to be very thorough and the contents were not disputed by the respondent.

[21] The transcript makes clear that Mr Houghton was given an opportunity to explain why he had sent the email and then reacted very angrily to Mr Hudson. Mr Houghton explained that he had been frustrated and stressed at the time. He said that he had been stressed because he had had 24 passengers walk out on the last night of his tour and he had been frustrated because, essentially, the problem of the poor food and accommodation had been known to the company and so had been preventable. Mr Houghton believed that Mr Hudson should have taken steps to ensure the accommodation and food offered by the hotel in X was of better quality and that it was predictable that passengers would become unhappy with what they were presented with.

[22] Mr Houghton had been particularly frustrated because he had had complaints about the same hotel two weeks before and had passed on the passenger feedback forms to the office in Auckland so that he had hoped that the problem would have been both brought to the attention of the respondent company and also the accommodation provider and chef.

[23] Mr Houghton said in the disciplinary meeting that he could not remember exactly what he had said during the telephone conversations with Mr Hudson on 21 January but that, during the first conversation, Mr Hudson denying that he was aware of any particular problems with the accommodation in X effectively pushed Mr Houghton over the edge so that he lost his temper. A lot of the disciplinary meeting was spent discussing whether Mr Hudson could reasonably have known about the poor feedback relating to the accommodation.

[24] There was also discussion about whether Mr Houghton's outbursts were out of character, which led to some discussion about passengers having complained about Mr Houghton's *brash* and *short attitude*. That led to some discussion about two recent customer complaints that the company had received about Mr Houghton and what an acceptable amount of negative feedback would be for a tour guide and bus driver.

[25] Overall, having read the transcript of the meeting, I am satisfied that Mr Houghton had a full opportunity to explain his conduct that was the subject of the disciplinary meeting. I am also satisfied that he took advantage of that opportunity.

[26] Ms Bailey, who gave evidence that it was her decision and not Mr Hudson's to dismiss Mr Houghton, wrote a letter to Mr Houghton dated 26 January 2011 which contained the following conclusions:

1. In all the circumstances, I am not satisfied that your comments adequately explain or excuse your rude, aggressive and disrespectful conduct by email and telephone on 21 January 2011. In particular, I am not satisfied that these were isolated incidents that can be adequately explained or excused by stress, fatigue and/or customer pressure.

2. [in relation to customer concerns] your explanations did not satisfy me that the passengers' comments were without merit. They have left me concerned that you cannot be relied upon to prioritise and take responsibility for good customer service.

Decision

The conclusions in relation to your conduct on 21 January and the customer complaints (1, 2 and 3), individually and cumulatively, lead me to the view that your conduct has deeply impaired the trust Stray can have in you as an employee who performs a responsible, autonomous and client-facing position. Accordingly, I have decided to terminate your employment with immediate effect. I will arrange the processing of your final pay, and ask that you return all Company property immediately.

The issues

[27] The Authority must decide the following two main issues:

- a. Was Mr Houghton's dismissal justifiable?
- b. Should penalties be awarded against Mr Houghton for breaches of his employment agreement?

Was Mr Houghton's dismissal justifiable?

[28] Mr Houghton argues that his dismissal was both procedurally and substantively unfair. As Mr Houghton's dismissal took place prior to the amendments to the Employment Relations Act 2000 in April 2011, the appropriate s103A test to apply means that the Authority must decide whether his dismissal was the action that

a fair and reasonable employer in all the circumstances would have taken at the time that dismissal occurred.

Was there procedure unfairness?

[29] Mr Houghton's counsel submits that Mr Houghton was not provided with notice of all the specific allegations that led to his dismissal. One of the issues that had been discussed in the disciplinary meeting concerned the use of swear words by Mr Houghton in an internet based drivers' forum. Mr Houghton had been told by Mr Hudson in June 2010 that he was not to use such swear words in the forum and Mr Hudson agreed that Mr Houghton had immediately stopped doing so. Ms Bailey explained that the reference to the use of Mr Houghton's bad language prior to June 2010 in the drivers' forum was to establish that Mr Houghton had been aware that bad language was not tolerated by the respondent company. I am therefore satisfied that Mr Houghton's use of bad language in the drivers' forum prior to June 2010 did not form part of the reason for the dismissal, other than in the sense that it was evidence that Mr Houghton was aware of the company's stance on the use of bad language. I do not accept that this caused unfairness to Mr Houghton.

Was Mr Houghton given sufficient opportunity to refute or explain allegations in relation to the customers' complaints?

[30] The complaints in question refer to Mr Houghton only being interested in the people in the group who liked to drink and enjoy his jokes; that Mr Houghton gave the group little information; that his driving was dangerous; that he talked too much about how hard he was working; that he wasn't always available and had not given the passengers a phone number during his day off; that he did not respect the wishes of some of the customers; he didn't mention an optional activity; he was unfriendly and that he had failed to ensure that a passenger's room was upgraded.

[31] It is true from the transcript that each of these complaints were not discussed in detail during the disciplinary meeting. However, during the Authority's investigation Ms Bailey confirmed that she believed that it was the disrespectful email together with the two angry phone calls to Mr Hudson that justified dismissal on their own. It is clear that it would have been unjustifiable for the company to have dismissed Mr Houghton on the basis of the complaints received from the passengers outlined above when the company concedes that most drivers get negative feedback occasionally and that Mr Houghton has had a considerable amount of very positive

feedback over the years. However, I am satisfied that, were it not for the email and angry telephone calls, Mr Houghton would not have been dismissed for the customer complaints alone. Therefore, although he was not given a full opportunity to discuss the customer complaints, this did not prejudice Mr Houghton as the customer complaints were not instrumental in his dismissal. This does illustrate, however, that covering both conduct and performance issues (as I tend to view the subject matter of the customer complaints) in one disciplinary meeting can lead to misunderstandings on the part of employees, and is best avoided.

Was the dismissal substantively justified?

[32] Counsel for Mr Houghton submits that the conduct was not serious misconduct, dismissal was out of proportion to the conduct, insufficient weight was given to the reasons put forward by Mr Houghton, that the language used on the drivers' forum was resurrected and that the company has raised the information that came to light following dismissal.

[33] Ms Bailey referred to Mr Houghton's individual employment agreement and stated that *excessive rudeness* amounts to serious misconduct according to its terms. Clause 23.1(m) states that:

Unacceptable and excessive rudeness to customers, industry personnel or members of the public whilst on duty

constitutes serious misconduct.

[34] Whilst, strictly speaking, industry personnel seems to refer to external personnel, such as accommodation providers, I am content that this makes clear that excessive rudeness to one's colleagues or managers should also be regarded as potentially serious misconduct. Even if this example were not given in the individual employment agreement, I would be satisfied that, under most circumstances, sustained swearing at one's manager could constitute serious misconduct.

[35] In this particular case, I do not believe that the email on its own constituted serious misconduct, although it was rude and disrespectful. Ms Bailey accepted this during her evidence to the Authority and said that the email alone had not been a dismissible offence. However, I am satisfied that the respondent was entitled to conclude that the swearing and abuse on the morning of 21 January 2011 and the swearing and abuse several hours later (both occasions of which were directed at the

operations manager Mr Hudson) pushed the overall conduct into the category of serious misconduct.

[36] With respect to the allegation that the dismissal was out of proportion to the conduct, this is, I believe, a finely balanced question. However, I conclude that the respondent was reasonable in taking the following into account:

- a. The email and the comments directed at Mr Hudson during both conversations were personal in nature and did not just contain generalised swearing;
- b. The swearing during the second conversation took place several hours after the first conversation during which Mr Houghton had ample time to calm down;
- c. Whilst Mr Houghton apologised in a text to Mr Hudson sent late in the evening on 21 January 2011 (*I apologise 4 blowing up at u today*) that had only happened after Mr Houghton had seen the letter inviting him to a disciplinary meeting;
- d. The transcript of the disciplinary meeting records Mr Houghton saying that he apologised if he had sworn, although nothing in the transcript suggests that he was truly contrite for what had happened;
- e. Mr Houghton was employed in an intensely client facing role where he was expected to take command of situations and therefore maintain the trust of his employers to behave courteously and diplomatically; and
- f. Whilst Mr Houghton was very stressed and tired when he sent the email and spoke disrespectfully to Mr Hudson, his job was inherently stressful and it was reasonable for the company to expect him to be able to cope with such stress without launching into a tirade of abusive language.

[37] I would like to record that I do have a great deal of sympathy for Mr Houghton being faced with a situation where his worst fears about the standards of the accommodation he was taking his group to proved to be accurate. I do not disbelieve him when he states that he believed that senior management at the respondent company was fully aware of the problems with the accommodation in question. I also

accept that he was stressed when he sent the email and made the telephone calls to Mr Hudson. However, for the reasons that I have cited above, I believe that it was reasonable for the employer to have concluded that such conduct that he displayed was so egregious that it destroyed the trust and confidence owed by Mr Houghton to his employer. I therefore believe that dismissal was the action that a fair and reasonable employer would have taken in all the circumstances at the time of the dismissal.

[38] I also believe that the company did take into account the explanations given by Mr Houghton (although during the investigation meeting Mr Hudson seemed very reluctant to admit that Mr Houghton could have been stressed) but I accept that it was reasonable for Ms Bailey to conclude that, notwithstanding Mr Houghton's stress, that stress did not justify the reaction that Mr Houghton displayed over a sustained period during 21 January 2011.

[39] As I have already explained above, I do not believe that the respondent wrongly relied on the language used in the drivers' forum.

[40] Counsel for Mr Houghton raises a point that Ms Bailey stated in her witness statement that a complaint had been received following the decision to terminate, concluding that this supported her decision to terminate Mr Houghton's employment. It is clearly the case that such a complaint could not possibly be a justification for the dismissal. However, I do not believe that that complaint in any way would have tipped Ms Bailey over into a decision to dismiss had it been known to her before the decision was made and therefore I have simply ignored that further complaint in any event.

[41] In conclusion, I cannot find that Mr Houghton's dismissal was unjustified.

Should penalties be awarded against Mr Houghton for breaching the terms of his employment agreement?

[42] The respondent alleges that, between 22 and 25 January 2011 Mr Houghton sent text messages from the mobile phone that belonged to the respondent company which were likely to be harmful to the respondent's reputation. These included the following:

- a. A text message to an employee of a direct competitor of the respondent:

I had a big blow up with my boss yes.day Cos all my pax walked out on shit food & accom he's got in [X]. Taxi is flying me upto Auck to have a meeting and probably try 2 sack me. Haha. So I'm lookin 4 a new job mate? Mike

- b. And by a text message from the respondent's mobile phone to one of its accommodation providers Mr Houghton stated:

I had a big blow up with Taxi yes.day. He is flying me upto Auck to have a meeting and probably try 2 sack me! Mike HaHa.

- c. By a text message to an employee of the hotel in X:

My grievance is with Taxi choosing to ignore the situation for 2 years.

[43] Mr Houghton does not deny that he sent these text messages. It is clear that Mr Hudson had instructed Mr Houghton in his letter inviting him to a disciplinary meeting on 21 January 2011 that he was not to discuss the issue with anyone other than him or Ms Bailey. Despite this, Mr Houghton sent the following texts to a Stray employee:

Sorry M8 currently I'm not allowed 2 talk 2 anyone from Stray until I have a meeting with Taxi & Heather in Auck; and

Can't talk! Getting sacked!

He sent a text to another Stray employee in the following terms:

Gull, u know I said I had been a bit down when I saw u the other day. Well the wheels fell off! If u haven't heard I'm flying to Auckland 2day 4 disciplinary meetin!

[44] All of these texts were sent after Mr Houghton had received the letter from the company and before his dismissal. In other words, while he still owed a duty to the respondent company to obey a reasonable instruction.

[45] The respondent company argues that the texts sent to the external recipients were likely to be harmful to the respondent's reputation. The respondent also argues that the texts sent to the employees of the respondent were sent deliberately disobeying the instruction in the letter sent to him on 21 January. Again, Mr Houghton does not deny that he sent those texts to the employees of the respondent company.

[46] The respondent company seeks the imposition of a penalty of \$10,000 against Mr Houghton for each of the breaches they rely on.

[47] Counsel for Mr Houghton argues that the breaches were not wilful.

[48] I am satisfied that Mr Houghton sent the text messages after he had received the letter of 21 January 2011 and that he did so deliberately ignoring the instruction contained in that letter. Furthermore, I consider that the instruction was reasonable and that, given that the issue included negative information about one of the accommodation providers with which the respondent company dealt, that there was good reason for the instruction.

[49] Furthermore, Mr Houghton owed the respondent company a duty of trust and confidence as well as the duty to obey reasonable instructions. Whilst he may have believed that he was going to be dismissed in the period during which he sent those texts, he still owed those duties.

[50] Accordingly, I consider that Mr Houghton deliberately breached these duties.

[51] Section 134 of the Employment Relations Act 2000 provides that every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

[52] Accordingly, I believe that it is appropriate to impose a penalty against Mr Houghton for those actions. However, it is clearly wholly disproportionate to impose the level of penalties sought by the respondent company, which are the maximum available under the Act against an individual, and so would therefore only be imposed in the most egregious of cases. There was no evidence put forward that the texts sent caused any material damage to the respondent company.

[53] I believe that an appropriate penalty to award against Mr Houghton is the total sum of \$1,000 in respect of all of the breaches that occurred, cumulatively. That penalty shall be payable to the respondent.

Costs

[54] The parties are invited to seek to agree between themselves how costs should be dealt with. In the absence of such an agreement within 28 days of the date of this determination, the respondent may serve a memorandum upon the applicant and lodge

the same with the Authority. The applicant shall then have a further 28 days within which to lodge and serve a response.

David Appleton
Member of the Employment Relations Authority